LIM SIEW HONG

v.

CONTRAVES ADVANCES DEVICES SDN BHD & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[JUDICIAL REVIEW NO: MT1-13-3-2004]
12 JANUARY 2006

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Award of Industrial Court - Whether award "unreasonable" in Wednesbury sense - Whether award of final remedy decided correctly - Where company has Scheme for retirement gratuity and pension benefits for company's employees who are discharged from employment - Scheme administered under a trust - Whether Scheme creates contractual rights and obligations between company and employee - Whether employee who is made redundant is entitled to such retirement gratuity and pension benefits*

The applicant was employed with the company for over 25 years, since 1974. In 1993, the company implemented the Group Staff Recruitment Gratuity and Pension Scheme ("the Scheme") by taking out a policy with an insurance company, for the benefit of its senior staff, including the applicant. The Scheme was a protection of the matured sum meant to be paid out to an employee who is discharged from employment with the company. The company had also *vide* a trust deed created a trust to administer the Scheme. On 2 June 1999, the applicant was made redundant. She was offered an *ex gratia* severance package ("the package") which included an *ex gratia* payment of RM100,000. The applicant asked for redundancy benefits pursuant to the Scheme, but the company had ruled that out as irrelevant. Being dissatisfied, the applicant rejected the package and upon reference of the matter to the Industrial Court, the learned chairman dismissed the applicant's claim for reinstatement. The applicant applied for judicial review by way of *certiorari*. There was a common ground pertaining to the existence of redundancy. The main issue which arose for determination was as follows: "Where the company has taken out the Scheme for its senior staff, including the applicant, and a member of the staff is discharged through redundancy, is the company under a legal and contractual obligation to fulfil the terms and conditions of the Scheme?" ("the Question")

Held (answering the question in the affirmative and thereby allowing the application):

(1) The purpose of the Scheme was to provide for retirement gratuity and pension benefits for the company's employees, including the applicant in the event of a discharge from employment with the company. The Scheme had created the contractual rights and obligations of the company and the applicant in very plain terms *viz.* in the event of the applicant being discharged through no fault of her own such as redundancy which was specifically the case here, she shall be entitled to the company's contributions to the amount of 100% as the applicant has put in service spanning 10 years and more. (paras 24 & 25)

(2) The company being the insured-cum-policy holder is bound by the terms of the Scheme to take the initiative to make the necessary claim for and on behalf of the applicant as a member of its staff. This obligation on the part of the company is further concretised in the creation of the trust under the trust deed. (paras 27 & 28)

Case(s) referred to:

Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Bank Bumiputra Malaysia Bhd v. Mohamed Salleh [2000] 2 CLJ 13 CA ***(refd)***

Council of Civil Service Unions v. Minister For Civil Service [1985] AC 374 ***(refd)***

Pominathan Kuppusamy v. Besprin Stationers Sdn Bhd [2003] 3 CLJ 118 HC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

For the applicant - Leela Chelvarajah; M/s Leela Chelvarajah
For the company - A Ramadass; M/s Ramadass & Assocs

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing J:

Notice Of Motion

[1] This is the applicant's notice of motion seeking judicial review by way of *certiorari* to move the Industrial Court Award 727 of 2004 ("the award") into this court for the purpose of quashing it.

Factual Background

[2] The applicant commenced employment in 1974 as an accounts clerk with the company which manufactures and markets biochemical equipment and components, military electronic/opto electronic sub units and parts thereof.

[3] In 1980, she was promoted as finance manager, and in 1983, as company secretary and to its board of directors.

[4] From 1991 to 1993, the company sponsored the applicant to complete a diploma course in management.

[5] In 1994 to 1997, the company again sponsored her to complete a master of business administration course.

[6] Meanwhile in 1993, the company implemented the Group Staff Recruitment Gratuity and Pension Scheme ("the scheme") by taking out a policy with an insurance company, for the benefit of its senior staff, including the applicant. The scheme is a protection of the matured sum meant to be paid out to an employee who is unfortunate enough to be discharged from employment with the company. The company has also *vide* a trust deed created a trust to administer the scheme. The applicant has at the material time completed 25 years of service.

[7] On 2 June 1999, the company's executive director verbally, followed by a letter, informed the applicant that due to poor business she would be made redundant. She was offered an *ex gratia* severance package ("the package") which included an *ex gratia* payment of RM100,000 for loss of employment which would serve as full and final settlement of all claims arising therefrom.

[8] The said letter disclaimed any legal or contractual obligation on the company to pay retrenchment benefits.

[9] The applicant had asked for an explanation from the company but none was forthcoming from the director. She had also asked for redundancy benefits pursuant to the scheme, but the executive director had ruled that out as irrelevant.

[10] The applicant would not accept the offer of the *ex gratia* payment, unless her claims under the scheme were also paid to her, calculated up to her retirement date.

[11] The company *vide* letter dated 16 June 1999 effected payment of all other payments relating to the salary earned, salary *in lieu* of notice, balance of annual leave entitlement, pro-rated 13th monthly salary and car allowance.

[12] Being dissatisfied, the applicant rejected the package and filed an appeal on ground of unjust and unfair termination at the Industrial Relations Department Melaka.

[13] Upon reference of the matter to the Industrial Court, the learned chairman decided that the termination was with just cause and excuse and that the redundancy was proper, and had thereby dismissed the applicant's claim for reinstatement without any loss of wages, allowance, service, seniority, privileges or benefits or other alternative relief.

[14] The applicant has now abandoned her claim for reinstatement.

Challenge To Decision-Making Process

[15] At this juncture, it is appropriate to set out the principles governing the grounds for sustaining a substantive notice of motion to challenge a decision-making process by way of *certiorari,* as follows:

1. It is neither an appeal nor a review of the decision itself, but a review of the decision-making process of the tribunal to see if there are errors of law on the face of the record;

2. It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed; and an error may be disclosed if the decision-maker eg,:

   (1) asks himself the wrong question;

   (2) takes into account irrelevant considerations;

   (3) omits to take into account certain relevant considerations (an Anisminic error);

   (4) misconstrues the terms of the relevant statute; or

   (5) misapplies or misstates a principle of general law.

   (per Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 CA at 765);

3. In process or substance, an impugned decision is flawed on ground of:

   (1) illegality, meaning that the decision must be based on law and the decision maker must understand directly the law that regulates his decision making power and must give effect to it, and whether he has or not is par excellence a justiciable question;

(2) irrationality meaning "Wednesbury unreasonableness", so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it, as enunciated in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB 223;

(3) procedural impropriety covering failure:

(a) to observe basic rules of natural justice;

(b) to act with procedural fairness;

(c) to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice; and

(4) possibly, proportionality.

(per Edgar Joseph Jr FCJ in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 FC at pp 172b to 173b; referring to the judgment of Lord Diplock in *Council of Civil Service Unions v. Minister For Civil Service* [1985] AC 374.)

Issues Raised

[16] Applicant's learned counsel Miss Leela Chelvarajah raised, and the company's learned counsel Mr. A Ramadass replied to, the issues of unjust and unfair termination in the letter of termination, absence of natural justice, non-observance of the company's obligations in a retrenchment exercise and the company's denial of the scheme.

[17] In this regard, it is necessary for me to refer to para 11 of the applicant's statement of case, wherein the applicant averred that the company's refusal to release to her the benefits of the scheme, for which the company had taken out a policy with an insurance company, is evidence of *mala fide* tainting the dismissal. It is to be noted that the crux of the applicant's case has actually been crystallized before the Industrial Court where she testified and confirmed that if she had been paid the benefits under the scheme, she would not have challenged the issue of termination without just cause or excuse.

[18] In the circumstances, the issue for determination before the Industrial Court and now in this application before me may be formulated as follows:

A Where the company has taken out the Scheme for its senior staff, including the applicant, and a member of the staff is discharged through redundancy, is the company under a legal and contractual obligation to fulfil the terms and conditions of the Scheme?" ("the Question")

B **Irrationality**

[19] It was submitted for the applicant that at the time of the purported redundancy, she had a legitimate expectation to a legal and contractual right under r. 4 and 7 of the scheme, which had been disregarded by the learned chairman in defiance of logic and rationality, C constituting an error of law, *Bank Bumiputra Malaysia Bhd v. Mohamed Salleh* [2000] 2 CLJ 13 CA; and *Pominathan Kuppusamy v. Besprin Stationers Sdn Bhd* [2003] 3 CLJ 118 HC were cited in support.

[20] The company contended that the non-payment of the benefits D under the scheme was the real reason or basis for her claim in the Industrial Court, but that the applicant's entitlement under the scheme was not for the company to decide.

[21] On the issue, the learned chairman stated in his award as follows:

E Again although the company was under no legal or contractual obligation to repay retrenchment benefits to the claimant nevertheless it offered to pay an *ex gratia* payment in the sum of RM100,000 for the past services and loss of employment.

[22] From the above submissions, it is abundantly clear to me that F there is a common ground pertaining to the existence of redundancy.

[23] That being the case, the answer to the question is to be ascertained by reference to the construction of the clauses in the scheme, which must in turn be read in conjunction with the provisions contained G in the trust deed pursuant to which the company had created a trust to administer the scheme.

[24] Upon a proper perusal of the scheme, I am of the view and it cannot be disputed that the purpose of the scheme is to provide for retirement gratuity and pension benefits for the company's employees, H including the applicant in the event of a discharge from employment with the company. Specifically, r. 7 thereof provides, where relevant, as follows:

Rule 7: Leaving The Employment.

I In the event of the Member … being discharged through no fault of his own eg redundancy, he shall be entitled to the benefits secured by the Company's contribution in accordance with the following table:

Length of service In the company	**Percentage of benefits**
…	
…	
10 years and more	100%

[25] There can be no doubt that under r. 7, the scheme has created the contractual rights and obligations of the company and the applicant in very plain terms *viz.* in the event of the applicant being discharged through no fault of her own such as redundancy which is specifically the case here, she shall be entitled to the company's contributions to the amount of 100% as the applicant has put in service spanning ten years and more.

[26] Two authorities which clearly confirm the applicant's rights are:

1. *Mohamed Salleh, supra*, where the employee's contract of employment with the bank was contained in the "Officers Handbook". At the material time, the bank had a "Group Accident Insurance Policy" covering various risks in respect of its employees. The bank was the insured under the policy and was solely to receive the benefits due to its employees under the policy. The amount payable in the employee's case was RM75,000. The bank declined to accede to the employee's demand for compensation. Both the High Court and the Court of Appeal granted a declaration that the bank was answerable to the employee with regard to the policy. Gopal Sri Ram JCA in delivering judgment for the Court of Appeal dealt with it as a straightforward case of a breach of contract.

2. *Poominathan Kuppusamy, supra*, where the facts were substantially similar, and Zaleha Zahari J (now JCA) followed the above Court of Appeal judgment.

[27] The insurance policy in the above two authorities are analogous to the scheme herein. I am of the view that the company being the insured-cum-policy holder is bound by the terms of the scheme to take the initiative to make the necessary claim for and on behalf of the applicant as a member of its staff.

[28] This obligation on the part of the company is further concretised in the creation of the trust under the trust deed. Clauses 1, 2 and 3 thereof where relevant merit reproduction as follows:

> 1. The Trustees shall hold all contributions as shall be paid to them by the Company upon trust to apply the same to effect and maintain all necessary assurance policies in providing the benefits

A to the members, shall receive the proceeds of the assurance policies, and shall pay the benefits in accordance with the Rules of the Scheme.

2. The Trustees shall be responsible only for paying out such sums as they may receive by virtue of the policies of assurance effected
B under the rules …

3. All moneys received by the Trustees pursuant to the Rules shall be held by them in trust for the objects defined therein.

[29] As the obligations of the company are clearly spelt out in the
C scheme and the trust deed, the company's contention that the applicant's entitlement under the scheme is not for the company to decide cannot be sustained. As a matter of fact, the insurance company has nothing to do with the applicant. The contractual relationship is between the company and the insurer with the company's members or staff including
D the applicant as beneficiaries. Harking back to fundamental principles in the law of contract, this is an exception to the doctrine of privity of contract. The applicant is therefore entitled to the benefits under the scheme in the event of redundancy in the instant application.

[30] Hence, the learned chairman's decision pertaining to the absence
E of any legal or contractual obligation in the face of the provisions contained in the scheme and the trust deed constitutes an irrationality as explained above, hence an error of law, thereby rendering the award amenable to judicial review.

F **Conclusion**

[31] On the foregoing grounds, the answer to the above question is in the affirmative.

[32] This is sufficient to dispose of this application and there is no
G necessity for me to deal with other issues raised by learned counsel respectively. However, I commend them for their efforts.

[33] I hereby allow this application, order the issue of *certiorari*, quash the award and hold that the applicant is entitled to the benefits under the scheme as at the date of redundancy ie, 2 June 1999, together with
H interest at 8% p.a. from the date hereof to the date of realisation, and costs of this application.

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